No. 04-320

Supreme Court, U.S.
FILED
NOV 5 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTHONY W. BOST, *et al.*,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

RICHARD CLINTON SAXTON
FEDERAL EXPRESS CORPORATION
3620 Hacks Cross Road
Building B, Third Floor
Memphis, TN 38125
(901) 434-8552

Counsel for Respondent

190740

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision that a plaintiff's Intake Questionnaire and affidavit do not constitute a timely charge in the absence of proof that the plaintiff or the EEOC manifested any intent that the questionnaire should be treated as a charge to activate the EEOC's administrative processes is consistent with decisions of this Court and with decisions of other courts of appeals.

2. Even if the Court determines that the first question presented by the Petitioners is appropriate for review, the additional questions presented by the Petitioners should not be reviewed because they were neither presented to nor decided by the Court of Appeals or the District Court.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Federal Express Corporation, is wholly owned by FedEx Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
1. The *Freeman* Litigation	1
2. Proceedings in the District Court.	2
3. Proceedings before the Eleventh Circuit Court of Appeals.	4
Reasons for Denying the Petition	7
1. The Eleventh Circuit's Decision is Consistent with Decisions of this Court and other Circuits.	7
2. The additional questions presented for review by the Petitioners were not presented to or decided by the Court of Appeals.	10
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Case:

Edelman v. Lynchberg College, 535 U.S. 106 (2002) 7, 8, 9

Price v. Southwestern Bell Telephone Co., 687 F.2d 74 (5th Cir. 1982) 9, 10

Robinson v. Fed. Nat'l Mortgage Ass'n, 673 F.2d 1247 (11th Cir. 1982) 6

Sanders v. Culinary Workers Union Local No. 226, 804 F. Supp. 86 (D. Nev. 1992) 10

Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974) 10

Williams v. General Electric Co., 269 F. Supp. 2d 958 (S.D. Ohio 2003) 10

Youakim v. Miller, 425 U.S. 231 (1976) 10

Statutes:

29 U.S.C. § 621, *et seq.* 1

29 U.S.C. § 626 3

29 U.S.C. § 628 3

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 8 1

Regulations:

29 C.F.R. § 12626.8 8

Respondent Federal Express corporation (hereinafter "FedEx" or "Respondent") hereby submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case skims over and omits facts that are significant to the decision of the Court of Appeals.

1. *The Freeman Litigation.*

The first version of this case was originally initiated in a separate case on October 26, 1999, by plaintiffs Freeman, Maccia, Clausnitzer, Creamer and Krolman (hereinafter the "*Freeman* plaintiffs"). Petition at A-3. In that case, the *Freeman* plaintiffs challenged policies implemented by FedEx in 1994 and 1995 as violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* Petition at A-5. By order entered September 25, 2000, the district court dismissed that complaint for failure to comply with Rule 8 of the Federal Rules of Civil Procedure, but granted the plaintiffs twenty days in which to file an amended complaint. Petition at A-14. The district court also denied the *Freeman* plaintiffs' class claims as moot. Petition at A-29.

Rather than file an amended complaint, the *Freeman* plaintiffs elected to appeal the dismissal to the Eleventh Circuit Court of Appeals. Petition at A-4. On January 14, 2002, the Eleventh Circuit affirmed the dismissal of the *Freeman* complaint and concluded that dismissal of the complaint was final because no amended complaint was filed within the time allowed by the district court. Petition at A-4.

On March 28, 2002, the district court entered an order directing administrative closure of the case on the ground that its September 25, 2000 order became final on October 23, 2000 when the *Freeman* plaintiffs did not file an amended complaint. Petition at A-4. The *Freeman* plaintiffs did not appeal that order.

2. *Proceedings in the District Court.*

On December 18, 2001, while the *Freeman* appeal was pending, Petitioner Bost — represented by counsel — completed an intake questionnaire and affidavit in which he made allegations of discrimination by FedEx and submitted these documents to the EEOC. Petition at A-3-4; A-69. The intake questionnaire specifically represented that it did not constitute a charge: "Information provided on this form will be used by the Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate." The intake questionnaire also stated that its purpose was to "solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction." Petition at A-67-68. Petitioner Bost has never presented any evidence that he or his counsel had any communications with the EEOC regarding any investigation by the EEOC or the effect of the intake questionnaire or affidavit. The EEOC did not serve the intake questionnaire or affidavit on FedEx. *See* A-24.

On May 9, 2002, this suit was initiated by the *Freeman* plaintiffs, Bost and four other Petitioners who admittedly never filed any charge of discrimination prior to filing suit

(hereinafter collectively referred to as the "Petitioners"). In the complaint, the Petitioners alleged that FedEx had adopted policies in 1994 that "were intended to and did operate to reduce the number and percentage of couriers over the age of forty by treating them less favorably than younger couriers."[1] Complaint, ¶ 12 (Petition at A-46). On June 5, 2002, one month after the suit was commenced, Petitioner Bost filed a charge of discrimination that was served on FedEx. Petition at A-18.

FedEx moved to dismiss the complaint on the ground that the Petitioners did not file their suit within ninety days of receipt of a notice of right to sue, as required by the ADEA.[2] Rather, the latest notice of right to sue issued to any of the Petitioners was that issued to Freeman on September 15, 1999, over two and a half years prior to commencement of the action. *See* Petition at A-3. FedEx further argued that, in the absence of timely charges by the *Freeman* plaintiffs, the other Petitioners who had not filed any charges of discrimination were not entitled to "piggyback" on the *Freeman* plaintiffs' charges under the "single filing" rule. In response, the Petitioners asserted for-

---

1. None of the Petitioners was terminated in one reduction-in-force or exit incentive program implemented by FedEx, as is typically the case in a collective action. Three Petitioners have been involuntarily terminated by FedEx, and not all for the same reason. Three other Petitioners voluntarily resigned their employment, and did so over a three and a half-year period. One Petitioner retired. Four still work at FedEx.

2. Under the ADEA, a plaintiff may commence a court case as early as 60 days after filing a charge of discrimination or as late as 90 days after receiving a right-to-sue letter. 29 U.S.C. § 626. (The Petitioners incorrectly refer to it as 29 U.S.C. § 628).

the first time that Bost's December 2001 intake questionnaire constituted a "charge."[3]

The District Court granted FedEx's motion, holding that neither Bost nor the *Freeman* plaintiffs had filed valid and timely charges on which other Petitioners could "piggyback." The District Court also dismissed the Petitioners' state law claims as untimely under the Florida Civil Rights Act. *See* Petition at A-35-36.

3. *Proceedings before the Eleventh Circuit Court of Appeals.*

On appeal, the Petitioners, in their brief, raised three issues:

> (1) Under the Valid Regulation of EEOC, Bost's Completed Questionnaire and Affidavit Constituted a Valid Charge When it was Filed with EEOC in December 2002 [sic];
>
> (2) The District Court Erred in Dismissing the State Law Claims with Prejudice and in Failing to Recognize that 28 U.S.C. § 1367(d) Tolled the State Statute of Limitations; and
>
> (3) The District Court Erred in Holding that Dismissal, with Prejudice, of the Complaint in

---

3. In the complaint, the Petitioners did not allege that Bost had filed a "charge," but rather stated that he brought suit more than 60 days "after he notified" the EEOC "of his charges that Federal Express had been engaged in discriminatory employment practices against older couriers." Petition at A-52 (Complaint, ¶ 28).

> Freeman, et al. v. Federal Express Barred the Freeman Plaintiffs from Asserting ADEA and FCRA Claims in this Case.

The Eleventh Circuit separately addressed whether the Bost Petitioners and the *Freeman* plaintiffs could "piggyback" under the single-filing rule to satisfy the exhaustion requirement. As the Court of Appeals explained,

> [u]nder the piggybacking rule, a putative plaintiff who has not filed an EEOC charge . . . may rely upon the claim of a plaintiff who has filed a timely charge. The piggybacking rule applies to ADEA cases. A plaintiff may piggyback on another plaintiff's charge provided (1) the relied upon charge is not invalid, and (2) the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame.

Petition at A-8 (citations omitted). The validity and timeliness of any charges filed by Bost and Freeman were therefore determinative of the claims of the other Petitioners.

As to the Bost Petitioners, the Eleventh Circuit held that Bost's December 2001 submission did not constitute a "charge" because the EEOC did not treat the submission as a "charge," and because the intake questionnaire itself did not suggest that it was a "charge." Petition at A-12-13. Additionally,

> There is no evidence that Bost manifested an intent to activate the administrative process by filing his intake questionnaire with the EEOC, as

> *Wilkerson* required. The undisputed evidence instead shows the opposite: Bost clearly understood that the intake questionnaire was not a charge because he later filed a timely charge. If Bost believed that he had filed a charge of discrimination when he filed the intake questionnaire, he would not have filed an additional timely charge of discrimination. Bost's conduct shows that he did not intend to activate the administrative process until he filed his formal charge of discrimination.

Petition at A-12.

Because Bost did not file a charge before filing suit, he did not comply with the ADEA's exhaustion requirements and his ADEA claim, as well as the ADEA claim of the Bost Petitioners, failed as a matter of law. Petition at A-13.

The Court of Appeals also concluded that the ADEA claims of the *Freeman* plaintiffs failed. The last right-to-sue letter to any of the *Freeman* plaintiffs was issued on September 15, 1999. The original action initiated by the *Freeman* plaintiffs was dismissed on September 25, 2000, with instructions to amend the complaint by October 23, 2000. When the *Freeman* plaintiffs failed to amend their complaint by that date, the involuntary dismissal of their complaint became an adjudication on the merits. Petition at A-14 (citing *Robinson v. Fed. Nat'l Mortgage Ass'n*, 673 F.2d 1247, 1249 (11th Cir. 1982)). The statute of limitations began to run at that time and expired before this suit was filed on May 9, 2002, 604 days later. *Id.* Additionally, the *Freeman* plaintiffs did not offer any explanation for their

delay in filing suit that would support revival of their complaint through equitable tolling. Petition at A-15.

The Court of Appeals also affirmed the District Court's dismissal of the Petitioners' state law claims. The Petitioners did not assert those arguments before the District Court until their supplemental motion to alter or amend the judgment. The Court of Appeals held that that District Court's denial of the motion to alter or amend was not an abuse of discretion. Petition at A-15-16.

REASONS FOR DENYING THE PETITION

As to the first issue presented by the Petitioners, the Petition should be denied because the decision of the Court of Appeals is consistent with decisions of this Court and other courts of appeals. Any perceived conflict among the courts of appeals is reconcilable on the facts of each case. As to the additional issues presented by the Petitioners, the Petition should also be denied because those issues were neither presented to nor decided by the Court of Appeals.

1. *The Eleventh Circuit's Decision is Consistent with Decisions of this Court and other Circuits.*

According to the Petitioners, four or five circuits treat any written submission to the EEOC that identifies an employer and describes some discriminatory conduct as a "charge." This assertion mischaracterizes the rulings of those circuits and also is inconsistent with this Court's decision in *Edelman v. Lynchberg College*, 535 U.S. 106 (2002). In the end, there is no conflict among the circuits, only reconcilable decisions that logically reach different results based on different facts.

Contrary to the Petitioners' representations in the Petition, this Court's decision in *Edelman* does not compel rejection of the "manifest intent" approach of the Eleventh Circuit. In *Edelman*, the plaintiff submitted an unverified statement of his allegations of discrimination to the EEOC soon after he was denied tenure. When the plaintiff's interview with the EEOC was delayed, his lawyer advised the EEOC of his understanding that the delay "will not compromise the filing date." The plaintiff thereafter completed a verified charge of discrimination 313 days after he had been denied tenure. The issue before this Court was the validity of the EEOC's regulations that permitted an otherwise timely filer to verify a charge after the time for filing has expired.[4] This Court confirmed the validity of that regulation.

That determination, however, did not finally resolve the plaintiff's claim; this Court expressly did not reach the district court's conclusion that the plaintiff's letter "was not a charge under the statute because neither he nor the EEOC treated it as one." 535 U.S. at 119. In other words, this Court implicitly recognized that not all written submissions to the EEOC that identify an employer and describe some discrimination are intended to constitute a "charge." On remand, the court of appeals determined that the plaintiff did treat the letter as a charge, based in part on his attorney's written determination to maintain the filing date.

Therefore, *Edelman*, standing alone, refutes the Petitioners' assertion of a conflict among the circuits that warrants this Court's review of the Eleventh Circuit's

---

4. The challenged regulation was 29 C.F.R. § 12626.8 which is set out in the Petition at pages "c" and "d."

decision. Under *Edelman*, the Eleventh Circuit appropriately and properly considered how the EEOC and Bost treated the submission to the EEOC.[5] To the extent that any circuit holds that consideration of those circumstances is not appropriate, it is inconsistent with *Edelman*. That approach is further supported by strong policy considerations. As the Petitioners pointed out in the Petition, the EEOC considers more than 80,000 charges each year. Petition at 12. Under the Petitioners' position, that number would exponentially increase because the EEOC would be required to investigate and attempt to conciliate every written statement of discrimination that was submitted to the EEOC.

Moreover, the cases cited by the Petitioners also demonstrate that all circuits consider the facts surrounding a plaintiff's submission to the EEOC in determining whether a submission constitutes a charge.[6] For example, the Fourth Circuit clearly considered those facts when deciding *Edelman* on remand. In *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982), the Fifth Circuit determined that an unverified charge was sufficient because it "informed the EEOC of the identity of the parties and described the alleged discriminatory conduct in enough detail to enable it to issue

---

5. The Eleventh Circuit's determination was based on undisputed facts that do not support an inference that Bost intended his questionnaire to constitute a charge of discrimination. Even now, the Petitioners do not challenge those facts or make any claim that the facts can be construed to show that Bost did intend his questionnaire to constitute a charge. Their only argument is that all such facts are irrelevant as a matter of law.

6. Additionally, most of the cases cited by the Petitioners as constituting a conflict among the circuits were decided before this Court's decision in *Edelman* in 2002.

an official notice of charge to [the defendant], thus setting the administrative machinery in motion." *Id.* In *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974), even though the union claimed that it never received notice of charges filed by the plaintiffs, the Sixth Circuit held that the district court properly exercised jurisdiction because the union participated in conciliation discussions and the EEOC records showed that the union was named in the charges. *See Williams v. General Electric Co.*, 269 F. Supp. 2d 958 (S.D. Ohio 2003) (adopting "manifest intent" test). In *Sanders v. Culinary Workers Union Local No. 226,* 804 F. Supp. 86 (D. Nev. 1992), a District Court (affirmed by the Ninth Circuit) determined that an intake form submitted by a plaintiff who may have been represented by counsel did not constitute a charge, especially when the union never received notice of the claim until after the expiration of the 300 day limit. Therefore, any conflict among the circuits is simply factual in nature, not any conflict of applicable legal principles.

In summary, the Petition should be denied with respect to the first issue presented for review by the plaintiffs.

2. *The additional questions presented for review by the Petitioners were not presented to or decided by the Court of Appeals.*

In their Petition, the Petitioners identify two additional issues that are purportedly related to the first issue presented for review. Petition at i. Neither of those issues, however, was presented to or decided by the Court of Appeals and are not appropriate for review on certiorari. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

The argument section of the Petition that corresponds to the two additional issues appears to address only the tolling of the statute of limitations when a class is limited or decertified. Petition at 17-20. No class, however, was ever certified in this case or in the *Freeman* case. Additionally, the statement of issues presented to the Court of Appeals by the Petitioners demonstrates that these issues were not raised before the Court of Appeals. In fact, the argument section seems to challenge decisions of the Eleventh Circuit in other cases, not this one. *See, e.g.*, Petition at 18, n.5 (representing that conflict exists between opinions of Second and Third Circuits with opinions of the Eleventh Circuit decided in 1994 and 2001); Petition at 19-20 (conflict between opinions of Second and Third Circuit and opinions of Eleventh Circuit decided in 2001 and 1998).

The Petition should therefore be denied with respect to the additional issues presented for review.

CONCLUSION

Therefore, the Petition should be denied in its entirety.

Respectfully submitted,

RICHARD CLINTON SAXTON
FEDERAL EXPRESS CORPORATION
3620 Hacks Cross Road
Building B, Third Floor
Memphis, TN 38125
(901) 434-8552

Counsel for Respondent